

TRIBAL SUPREME COURT PROJECT

MEMORANDUM

UPDATE OF SELECTED RECENT CASES

OCTOBER 21, 2024

The Tribal Supreme Court Project (Project) is part of the Tribal Sovereignty Protection Initiative and is staffed by the National Congress of American Indians Fund (NCAI Fund) and the Native American Rights Fund (NARF). The Project was formed in 2001 in response to a series of U.S. Supreme Court cases that negatively affected tribal sovereignty. The purposes of the Project are to promote greater coordination and improve strategy on litigation that may affect the rights of all Indian tribes. We encourage Indian tribes and their attorneys to contact the Project in our efforts to coordinate resources, develop strategy, and prepare briefs, especially when considering a petition for a writ of certiorari, prior to the Supreme Court accepting a case for review. You can find copies of briefs and opinions on the selected cases that we track on the Project website (<http://sct.narf.org>).

October 7, 2024, was the first day of the Court's October Term 2024. As of this Update, the Court has not accepted any Indian law cases for review. Among pending Petitions, the Project currently is tracking *Apache Stronghold v. United States* (24-291) (Religious Freedom) and *San Carlos Apache Tribe v. State of Arizona* (24-349) (copper mining permit). These two selected cases are detailed further below.

SELECTED PETITIONS PENDING

APACHE STRONGHOLD V. UNITED STATES (24-291)

Petitioner: Apache Stronghold, a non-profit corporation

Petition Filed: September 13, 2024

Subject Matter: Religious Freedom

Lower Court: U.S. Court of Appeals for the Ninth Circuit

Recent Activity: Amicus briefs in support of Petition filed October 15, 2024

Upcoming Activity: Brief in Opposition due October 22, 2024; Reply Brief due November 6, 2024

Oak Flat is a significant and unique sacred site for Western Apache people and is located on federal land within Western Apache ancestral territory and the State of Arizona. In 2015, legislation authorized the United States to transfer Oak Flat to Resolution Copper Mining, LLC. The proposed copper mine will completely and permanently destroy Oak Flat. Apache Stronghold, a non-profit corporation, sued the United States and Resolution Copper in federal district court challenging the land transfer and destruction of Oak Flat under the Religious Freedom Restoration Act (RFRA) of 1993, 42 U.S.C. §§ 2000bb, *et seq.*, which requires strict scrutiny of government action that would substantially burden religious exercise, and the U.S.

Constitution Free Exercise Clause which requires heightened scrutiny when the government substantially burdens religious practice.

The district court denied Apache Stronghold's requested preliminary injunction. On appeal to the U.S. Court of Appeals to the Ninth Circuit, a 3-judge motions panel upheld the preliminary injunction denial by a 2-1 vote. On plenary review, a divided 3-judge panel rejected Apache Stronghold's claims, with the majority holding that under existing Ninth Circuit law, a substantial burden only occurs when the government denies a benefit or imposes a penalty based on religious exercise. The dissent reasoned that preventing religious exercise entirely, by completely destroying a sacred site, is a substantial burden. *En banc* review by an 11-judge Ninth Circuit panel was granted, but Apache Stronghold's claims again were rejected by two different 6-5 majorities, with seven opinions issued in 246 pages. One majority held that, even if complete destruction of a sacred site is a substantial burden, the RFRA substantial burden test is inapplicable when the government is managing its own land. The dissenters questioned this limitation which stems from pre-RFRA Supreme Court decisions involving incidental effects on religious exercise but is not found in the text of RFRA and never has been applied to the government's prevention of religious exercise. After Apache Stronghold's petition for *en banc* review by the full Ninth Circuit was denied, Apache Stronghold filed its Petition for a Writ of Certiorari. Fifteen amicus briefs in support of the Petition were filed. The Brief in Opposition is due October 22, 2024, and the Reply Brief is due November 6, 2024.

SAN CARLOS APACHE TRIBE V. STATE OF ARIZONA (24-349)

Petitioner: San Carlos Apache Tribe

Petition Filed: September 25, 2024

Subject Matter: Mining permit under Clean Water Act regulations

Lower Court: Supreme Court of Arizona

Recent Activity: Responses waived October 8, 2024.

Upcoming Activity: Distributed for Conference of November 1, 2024

Resolution Copper, LLC, applied to the Arizona Department of Environmental Quality (ADEQ) under federal Clean Water Act regulations to renew an existing mine's discharge permit and included in its application a new mine site. ADEQ, which has delegated authority from the U.S. Environmental Protection Agency to administer discharge permits, renewed the permit, treating the new mine as materially connected to the existing mine. The San Carlos Apache Tribe challenged the ADEQ decision in state administrative and state court proceedings under the applicable federal regulations, arguing that the regulations required a new source analysis. The Arizona Supreme Court affirmed the ADEQ's decision to renew the permit.

SELECTED PETITIONS DENIED

NONE AT THIS TIME